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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIREFIGHTERS LOCAL UNION NO. 1784,
Petitioner,

v.

CARL W. STOTTS, *et al.*,
Respondents.

MEMPHIS FIRE DEPARTMENT, *et al.*,
Petitioners,

v.

CARL W. STOTTS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This brief will address the following questions:

(1) Whether the correctness of a preliminary injunction prohibiting the City of Memphis in May 1981 from reducing by layoffs or demotions the percentage of blacks then occupying certain positions in the Memphis Fire Department is moot where all the firefighters laid off or demoted by Memphis in 1981 have been restored to their former positions and the preliminary injunction has expired.

(2) Whether a preliminary injunction prohibiting the City of Memphis in May 1981 from reducing by layoffs or demotions the percentage of blacks then occupying certain positions in the Memphis Fire Department exceeded the district court's inherent authority to modify a prior consent decree to preserve the relief granted therein.

(3) Whether § 706(g) of the Civil Rights Act of 1964 authorizes race-conscious relief for systematic employment discrimination.

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes several former presidents of the American Bar Association, several law school deans, and many of the nation's leading lawyers.

The Committee conducts an extensive litigation program against employment discrimination, representing both government employees and private-sector employees. In some of its cases, consent decrees and adjudicated decrees have been entered that provide race-conscious affirmative relief to remedy an employer's past systematic discrimination. We have previously addressed the legality of race-conscious affirmative action in our *amicus* briefs filed in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

The Committee submits this brief primarily to develop two points that petitioners and their supporting *amici* overlook in arguing that Title VII does not authorize the federal courts to grant race-conscious relief: first, resolution of their contentions is inappropriate because the preliminary injunction at issue here is moot; and second, the question on the merits is not whether Title VII authorizes the preliminary injunction at bar but whether the district court abused its discretion in exercising its inherent authority to modify a consent decree. We also show that Title VII does authorize race-conscious relief.

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[1] The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Sup. Ct. Rule 36.2.

SUMMARY OF ARGUMENT

1. *Mootness.* The preliminary injunction at issue is moot. That order enjoined the City of Memphis in May 1981 from reducing, by layoffs or demotions, the percentage of blacks then occupying certain positions in the Memphis Fire Department. The City complied with this injunction in making layoffs and demotions within the Department. Subsequently, the City restored all the Memphis firefighters who were laid off or demoted to their former positions. Thus, the preliminary injunction at issue here has been irrevocably carried out, and no person's employment is at stake.

Petitioners have suggested that the expired preliminary injunction should be reviewed because the formerly laid-off firefighters lost seniority credit during the layoff period. But no firefighter has made any claim for restoration of seniority credit, and Tennessee law would not recognize such a claim. Even if a controversy over seniority credit did exist in some forum, such a controversy is not before this Court and hence would not justify review of the moot injunction. Moreover, the expired injunction, whether affirmed or reversed, would not constitute a defense for the City against claims by formerly laid-off firefighters for restoration of lost seniority. *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983).

The expired preliminary injunction is not justiciable as an order "capable of repetition, yet evading review." There is little chance that the 1981 layoffs, unprecedented in Memphis history, will recur. And even if Memphis firefighters are laid off in the future, those layoffs are not apt to be constrained by injunctive relief such as that challenged here. With the passage of time and even modest progress toward the goals of the consent decree, there will be no basis for enjoining seniority-based layoffs. Moreover, the preliminary injunction at bar is not inherently evasive of review. If the petitions for certiorari had not been held pending disposition of

a similar case, this case would likely have been decided prior to the recall of the laid-off firefighters. In addition, it was fortuitous that attrition and retirement permitted recall of all the laid-off firefighters prior to expiration of their 2-year recall rights, thus mooting the issue of the correctness of the injunction.

2. *Modification of a Consent Decree.* Petitioners contend that the preliminary injunction in this case exceeded the district court's authority under Title VII because it prevented the layoff of black firefighters who may not have been victims of the City's discrimination. In their view, such race-conscious relief is not authorized by Title VII. But the preliminary injunction at issue here did not rest upon the district court's authority to redress violations of Title VII; it rested upon the court's inherent authority to modify an approved consent decree to effectuate its basic purpose in light of unanticipated circumstances. A court may properly exercise its inherent authority to modify a consent decree to effectuate the original purpose of the decree without making the specific factual determinations that would be necessary to support the same relief in a litigated case, and without stopping to inquire whether the defendant could have successfully opposed such relief had the case proceeded to trial. By entering into a consent decree, the parties forego the litigation that would lead to judicial identification of the victims of discrimination. Such a decree may properly be modified to avoid frustration of the relief granted therein without reopening the factual disputes composed by the decree and requiring the plaintiffs to prove their case on the merits.

The district court did not abuse its discretion in determining that the preliminary injunction was necessary to effectuate the consent decree's purpose in light of the unanticipated layoffs announced by the City. That court reasonably concluded that the decree's purpose is prompt and ongoing correction of the underrepresentation of blacks in the Fire Department caused by discriminatory

hiring and promotion practices. The district court also reasonably found that the City's proposed layoffs on the basis of seniority would frustrate the decree's purpose.

3. *Race-Conscious Relief under Title VII.* Petitioners' contention that Title VII does not authorize race-conscious relief is not only inapposite, it is incorrect. Neither § 703(h) nor § 703(j), relied upon by petitioners, speaks to or limits the judicial remedies available to correct violations of Title VII. Section 706(g), the remedial provision of the title, vests broad authority in the district courts to issue such relief as deemed "appropriate." As the courts of appeals have unanimously held, race-conscious relief is "appropriate" in the context of manifest and pervasive employment discrimination. Moreover, in amending § 706(g) in 1972, Congress endorsed the prevailing judicial view that the authority conferred by § 706(g) encompasses race-conscious remedies that may benefit persons who are not proven victims of discrimination.

ARGUMENT

I. THIS CASE IS MOOT BECAUSE THE PRELIMINARY INJUNCTION AT ISSUE HAS BEEN IRREVOCABLY CARRIED OUT AND THIS COURT'S REVIEW OF THAT EXPIRED INJUNCTION WOULD NOT AFFECT THE PARTIES' LEGAL RIGHTS

A. The Correctness of the District Court's Decision to Grant a Preliminary Injunction Is Moot

In May of 1981 the City of Memphis faced an unprecedented fiscal crisis and promulgated a layoff policy to reduce its expenditures.[2] On May 8, 1981, the district

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[2] The layoff policy provided that: (1) the Mayor has sole authority to determine which positions would be abolished; and (2) any person occupying an abolished position may bump a less senior person within his classification or the least senior employee

court issued a preliminary injunction restraining the City from implementing its layoff policy in a manner that would "decrease the percentage of black lieutenants, drivers, inspectors and privates that are presently employed in the Memphis Fire Department." Pet. App. A78. The City fully complied with the preliminary injunction in making the layoffs and demotions it deemed necessary. Over the next two years, natural attrition and retirements created vacancies in the Fire Department, and, with the aid of a tax increase, all laid off or demoted firefighters were restored to their former positions. Respondents' Suggestion of Mootness at 1; Petitioners' Joint Opposition to Respondents' Suggestion of Mootness ("Joint Opp.") at 1. Thus, the preliminary injunction of May 8, 1981, which is the only order under review, has been irrevocably carried out and no firefighter's job is now at stake.

In addition, the preliminary injunction has expired. That order simply required that the City "not apply the seniority policy proposed" to decrease the percentage of blacks occupying certain positions in the Fire Department as of May 8, 1981. Pet. App. A78. Thus, even if the City at some future time announces new layoffs in the Fire Department, its decision would not be governed in any way by the order of May 8, 1981.[3]

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in a lower classification, or may go on layoff. J.A. 83-89. Because the actual effect of the layoff policy on an individual's employment depended on numerous decisions by other employees as well as the City administration, the City was unable to advise the district court of the precise impact that the layoff policy would have on blacks. J.A. 70. An exhibit compiled by the Fire Department and introduced at the preliminary injunction hearing, however, indicated that the City's layoff policy would drastically reduce the number of black lieutenants and drivers. J.A. 69, 96-97.

[3] Petitioners suggest that the preliminary injunction could conceivably affect future layoffs. Joint Opp. at 4. This contention is belied by the specific terms of the district court's order, quoted in text, by its provisional status as a preliminary injunction, and by the fact-specific rationale for its issuance. "The language of an injunction must be read in the light of the circumstances surround-

Since the correctness of the preliminary injunction is the only issue before the Court, this case is moot. *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), establishes that "the correctness of the decision to grant a preliminary injunction" is moot when "the terms of the injunction * * * have been fully and irrevocably carried out." *Id.* at 394, 398. Numerous other cases confirm that full compliance with an injunction moots the question whether the injunction should have issued. *E.g.*, *Oil Workers Union* v. *Missouri*, 361 U.S. 363 (1960); *American Book Co.* v. *Kansas*, 193 U.S. 49 (1904); *Western Addition Community Organization* v. *Alioto*, 514 F.2d 542, 544 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975); *Campbell Soup Co.* v. *Martin*, 202 F.2d 398 (3d Cir. 1953). As the Court explained in *Oil Workers Union*:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms * * *. Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.'"

Oil Workers Union v. *Missouri*, *supra*, 361 U.S. at 371, *quoting Brownlow* v. *Schwartz*, 261 U.S. 216, 217-18 (1922).

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ing its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent." *United States* v. *Christie Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972). *Accord*, *Haskell* v. *Kansas Natural Gas Co.*, 224 U.S. 217, 223 (1912). These factors all indicate that the preliminary injunction was directed only to the layoffs announced in May 1981. See also Fed.R.Civ.P. 65(d) (injunction must "be specific in terms").

B. The Expired Preliminary Injunction Is Not Saved From Mootness By the Fact that Laid-off Employees Did Not Accrue Seniority Credit During the Layoff Period

Petitioners maintain that the correctness of the district court's decision to issue a preliminary injunction is saved from mootness because the laid-off firefighters did not accrue seniority credit during the layoff period, and this loss adversely affects an employee's opportunities for future promotions and job transfers and an employee's security from future layoffs. Joint Opp. at 6-7. This argument fails for several reasons.

In the first place, the petitioners do not suggest that any formerly laid-off firefighter has filed a claim for seniority credit or, to raise a related issue, backpay, for the layoff period. *Amicus* is aware of no such claim. Thus, the "controversy" over seniority credit is hypothetical.[4]

Second, even if such controversies did exist, the decisions of this Court recognize that a case pending here is not kept alive because related issues are pending between the same parties in another forum. For example, in *Oil Workers Union* v. *Missouri*, *supra*, the Court declined to review an expired anti-strike injunction issued pursuant to an allegedly unconstitutional state statute, even though the challenged statute also governed a monetary penalty claim pending in state court against the union.

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[4] It is not surprising that no firefighter has brought suit claiming that he was laid off in violation of the Memorandum of Understanding, an agreement between the Union and the City providing that any layoffs shall be made on the basis of seniority. Pet. App. A81. The Supreme Court of Tennessee has recently confirmed that the Memorandum of Understanding confers no enforceable rights. *Futenwilder* v. *Firefighters Ass'n Local Union 1784*, 649 S.W.2d 268, 270 (Tenn. 1982). The Memorandum of Understanding is merely a reflection of the right of public employees to "meet and confer" with their employer; any binding agreement would violate the principle of Tennessee law that "[p]ublic employers cannot abdicate or bargain away their continuing legislative discretion. * * *" Opinion of Tennessee Attorney General No. 79-172 (April 10, 1979).

"[T]hat suit is not before us. We have not now jurisdiction of it or its issues. Our power only extends over and is limited by the conditions of the case now before us." 361 U.S. at 370, *quoting American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904). *Accord, Murphy* v. *Hunt*, 455 U.S. 478, 481 & n.5 (1982) (per curiam); *University of Texas* v. *Camenisch, supra*, 451 U.S. at 394.

Third, this Court's affirmance or reversal of the district court's expired preliminary injunction would have no effect on any claims by previously laid-off firefighters for restoration of lost seniority or backpay. The district court did not order the layoff of any firefighters. Nor did the district court address the issues of seniority credit or backpay for firefighters the City might choose to lay off. Judge McRae stated that "I don't know what the policy will be with regard to that memorandum of understanding that the City signed with the Fire Fighters Union." Pet. App. A76. Thus, the district court's order by its terms and intent does not bar any claims by laid-off firefighters for restoration of seniority or backpay. Under these circumstances, the expired preliminary injunction would not constitute a defense for the City to claims by laid-off firefighters. This much is made clear by this Court's recent decision in *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983), which held that a district court injunction requiring an employer to conduct any layoffs pursuant to the terms of a Title VII conciliation agreement, instead of pursuant to the seniority provisions of the collective bargaining agreement, does not constitute a defense to a damages claim by an employee laid off in violation of the collective bargaining agreement.[5]

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[5] To carry out the speculation regarding unasserted causes of action to its logical conclusion, we note that the City has no potential cause of action that could be affected by this Court's review of the district court's expired preliminary injunction. Even if formerly laid-off white firefighters seek backpay or seniority credit from the City and even if they prevail on those claims, the City would have no claim for reimbursement against respondents for securing an allegedly erroneous injunction. No bond was posted for

The recent case of *Boston Firefighters Union* v. *Boston Chapter, NAACP*, 51 U.S.L.W. 4566 (U.S. May 16, 1983) (per curiam) provides an instructive contrast to the case at bar. That case involved a *permanent* injunction enjoining seniority-based layoffs that would decrease the percentage of minority officers in the Boston Fire and Police Departments below specified levels. Like the instant case, the laid-off employees were reinstated to their former positions. Unlike the present case, the laid-off officers were pursuing administrative appeals seeking restoration of lost seniority and backpay. Also unlike the present case, in the Boston case the district court's injunction could have been interpreted as enjoining the administrative agency considering those claims from granting backpay or restoring lost seniority. *Castro* v. *Beecher*, 522 F. Supp. 873, 878 (D. Mass. 1981). Nevertheless, this Court remanded for consideration of mootness, 51 U.S.L.W. 4566, and the First Circuit dismissed the appeal as moot. *Boston Chapter, NAACP* v. *Beecher*, No. 81-1642, slip op. (1st Cir. Aug. 31, 1983). The present case is much more clearly moot.[6]

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the preliminary injunction, and "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co.* v. *Local Union 759, supra*, 51 U.S.L.W. at 4646 n.14.

[6] In the *Boston Firefighters* case, the laid-off policemen and firefighters were reinstated pursuant to a newly enacted state statute. As this Court explained, that statute "provid[ed] the City of Boston with new revenues, require[d] reinstatement of all police and firefighters laid off during the reductions in force, secur[ed] these personnel against future layoffs for fiscal reasons, and requir[ed] the maintenance of minimum staffing levels in the police and fire departments through June 30, 1983." 51 U.S.L.W. 4566. In the instant case, the City was able to reinstate all laid-off or demoted firefighters prior to expiration of their recall rights due to a tax increase and attrition within the Fire Department.

Unlike petitioners (Joint Opp. at 2-6), we perceive no feature in the Massachusetts statute that supports mootness in that case but not this one. Certainly the minimum staffing requirement provided no significant protection against recurrence of the controversy—that requirement expired six weeks after this Court's remand for

C. The Expired Preliminary Injunction Is Not Justiciable As An Order "Capable of Repetition, Yet Evading Review"

Ordinarily a case is moot if the parties lack a legally cognizable interest in its outcome, but the decisions of this Court recognize an exception to this rule for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). This exception is limited to cases satisfying two requirements: (1) there is a "reasonable expectation" or a "demonstrated probability" that the same complaining party will again be subjected to the challenged action; and (2) the challenged action is by its nature too short to be fully litigated prior to its cessation or expiration. *Murphy* v. *Hunt*, *supra*, 455 U.S. at 482; *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Contrary to petitioners' suggestion, Joint Opp. at 6, neither of the exception's requirements is met in this case.[7]

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consideration of mootness. Moreover, while the statute protected specific individuals from future layoffs, it did not prevent the Boston Police and Fire Departments from laying off other individuals; and in making such layoffs, the Departments were permanently enjoined from reducing the percentage of minority officers below specified levels.

[7] Petitioners and the United States also assert that this case is not moot unless respondents satisfy the "heavy burden" of establishing (1) that there is no reasonable expectation that the enjoined conduct will recur and (2) that interim relief or events have completely eradicated the effects of the alleged violation. Joint Opp. at 3-5; Brief for United States as *Amicus Curiae* at 7-8 n.11. As support for this argument, they cite *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953), and *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). Those cases stand for the proposition that a court should be reluctant to conclude that a case is moot where the defendant has voluntarily ceased the allegedly illegal conduct, possibly in order to defeat judicial review. Those cases and the test they apply in order to determine whether the plaintiffs continue to have a need for judicial relief are quite inapposite here. The plaintiffs, respondents here, have irrevocably received all the relief they

1. There is no "reasonable expectation" or "demonstrated probability" that the petitioners will again be subjected to the challenged injunctive relief. The layoffs of municipal employees announced by the City in May 1981 were the first such layoffs in the history of Memphis. Pet. App. A73; Pet. App. A8. This fact alone casts doubt on any claim that there is a "reasonable expectation" or "demonstrated probability" of future layoffs. See *Illinois State Board of Elections* v. *Socialist Workers Party*, *supra*, 440 U.S. at 187-88.

Even if Memphis does lay off City employees in the future, few if any Fire Department personnel are apt to be affected. The Mayor testified that the Fire Department was selected for reduction in 1981 because of a then-recent study showing that Memphis was devoting a much higher percentage of its total budget to fire protection than other cities of comparable size. J.A. 36-37. Now that the City has brought the Fire Department's budget into line, it is unlikely to target its workforce for reduction in the future.

Most important, even if firefighters are laid off in the future, the petitioners are unlikely to be subjected to injunctive relief such as that challenged here. While seniority-based layoffs would have had a significantly disproportionate effect on black firefighters in May 1981, the disproportionate impact of a seniority-based layoff policy will dissipate as existing black firefighters gain more seniority and other black firefighters are hired or promoted pursuant to the consent decree. Thus, given the passage of time and even modest progress toward attainment of the goals of the consent decree, "such extraordinary relief as that contained in the Order here appealed * * * will, in all probability, be unnecessary." *Western*

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requested and they garnered that relief not through the defendants' "voluntary cessation" but by court order. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974) (per curiam).

Addition Community Organization v. *Alioto*, 514 F.2d 542, 544 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 1014 (1975) (a case also involving temporary race-conscious relief against a fire department).

2. The "capable of repetition, yet evading review" doctrine is limited to controversies that, by their very nature, are unlikely to remain alive long enough to be definitively settled by the courts. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (opinion of Burger, C.J.); *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977); *DeFunis* v. *Odegaard*, *supra*, 416 U.S. at 319; *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974). The preliminary injunction at issue here is not such an inherently transitory order that it would typically evade full appellate review.

It was purely fortuitous that all previously laid-off employees were restored to their former positions prior to this Court's review of the controversy. The petitions for certiorari were filed on August 4, 1982; the last demoted or laid-off firefighter was restored to his position in June 1983. Only because this Court withheld ruling on the petitions pending disposition of *Boston Firefighters Union*, *supra*, did this controversy become moot prior to a decision on the merits by this Court. It was also fortuitous that attrition and retirement within the Fire Department permitted recall of all the laid-off employees prior to expiration of their 2-year recall rights (J.A. 88-89), thus mooting the issue of the correctness of the injunction. The instant case is moot because of these specific circumstances, not because the controversy is inherently evasive of review.

II. THE PRELIMINARY INJUNCTION WAS AN APPROPRIATE EXERCISE OF THE DISTRICT COURT'S INHERENT AUTHORITY TO MODIFY A CONSENT DECREE TO EFFECTUATE ITS PURPOSE IN LIGHT OF CHANGED CIRCUMSTANCES

A. The Preliminary Injunction Does Not Rest Upon the District Court's Remedial Authority Under Title VII But Rather Upon Its Inherent Authority to Modify the Original Consent Decree so as to Effectuate Its Basic Purpose

Petitioners and their supporting *amici* argue at length that the preliminary injunction, by awarding race-conscious relief to black firefighters who had not established that they were individual victims of discrimination, exceeded the district court's remedial authority under Title VII, specifically §§ 703(h), 703(j), and 706(g). Their arguments rest on an untenable premise—that if authority for issuance of the preliminary injunction exists, it necessarily derives from Title VII.

1. This Court has frequently recognized the "inherent" "power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). See also *Arizona* v. *California*, 51 U.S.L.W. 4325, 4330 (U.S. Mar. 30, 1983); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437 (1976); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief." *System Federation No. 91* v. *Wright*, 364 U.S. 642, 647 (1961). In this case, authority to modify the consent decree was also reserved by its terms. Paragraph 17 of the decree provides: "The Court retains jurisdiction of this action for such further orders as may be

necessary or appropriate to effectuate the purposes of this decree." Pet. App. A69.

Respondents' application for a preliminary injunction was not based on any allegation that the City's proposed layoffs violated Title VII. It was an appeal to the district court's discretion to effectuate the consent decree. J.A. 20-22. And the district court proceeded on that understanding. For example, the court opened the preliminary injunction hearing with the observation that the issue for its determination was whether the City's proposed layoffs amounted to changed circumstances that would perpetuate discrimination which the consent decree was intended to avoid. J.A. 30. Thus, petitioners' arguments regarding the scope of judicial authority to remedy violations of Title VII misconceive the basis for the district court's ruling.

2. Petitioners and the United States deny the existence of the district court's inherent and expressly retained authority to modify the consent decree to effectuate its purpose. They maintain that the district court's authority to modify the consent decree derives solely from the statute that the decree is intended to enforce, Title VII. In their view, the district court's remedial authority to issue the preliminary injunction "is the same as if the case had gone to a final, litigated judgment" under Title VII. United States Br. at 12 & n.13. See Union Br. at 20; City Br. at 23. That contention is unsupportable.

In its simple form, petitioners' Title VII argument is this: the preliminary injunction violates Title VII because it grants relief against an employer who has not been adjudged to have violated Title VII. Union Br. at 26; City Br. at 22-23. This contention is wholly without merit. It goes without saying that Title VII does not authorize a court to order relief against an employer who has not violated Title VII. But the basis for the preliminary injunction was not a new violation of Title VII; that injunction was designed to effectuate the basic pur-

pose of the consent decree in light of changed circumstances. See *Chrysler Corp.* v. *United States*, *supra*, 316 U.S. at 562; *cf. Wright* v. *Council of the City of Emporia*, 407 U.S 451, 459 (1972). This version of petitioners' argument rests on the notion that a consent decree settling a Title VII case can grant no relief to the plaintiff unless it contains an admission of liability by the defendant. Few if any Title VII cases would be settled if that were the law.

In an alternative formulation, petitioners' Title VII argument is that §§ 703(h), 703(j), and 706(g) preclude a federal court from awarding race-conscious relief against an employer who *has* violated Title VII. In their view, the only affirmative relief authorized by Title VII is "rightful place" remediation for proven victims of the employer's discrimination; such identified victims may be awarded the backpay and seniority that would have been theirs but for the employer's unlawful discrimination. In Part III we show that this is an erroneously restrictive view of judicial authority to remedy violations of Title VII. But whatever the merit of petitioners' argument in a litigated Title VII case, it should not be accepted as a limitation on the federal court's inherent authority to approve a consent decree or to modify such a decree to achieve its basic purpose.[8]

[8] Contrary to the majority opinion of the court of appeals (679 F.2d at 551-56; Pet. App. A12-A23), the validity of the 1980 consent decree was not put in issue by respondents' request for a preliminary injunction effectuating that decree. A request for modification of a consent decree, whether by the defendant on the ground that continued operation of the decree is inequitable, or by the plaintiff on the ground that modification is necessary to effectuate the decree's basic purpose, provides no warrant for impeaching the original decree's validity. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). See *Arizona* v. *California*, 51 U.S.L.W. 4325, 4330 (U.S. Mar. 30, 1983); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 432 (1976); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942); *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 799-80 (10th Cir. 1979). Thus, the validity of the relief contained in the consent decree, such as hiring and promotion ratios, is not at issue here.

This Court's decisions establish that a federal court may approve a consent decree or modify a consent decree to effectuate its basic purpose without making the specific factual determinations that would be necessary to support the same relief in a litigated case, and without stopping to inquire whether the defendant could have successfully opposed such relief at trial. *Swift & Co.* v. *United States*, 276 U.S. 311, 325-27, 329-30 (1928); *United States* v. *Swift & Co.*, 286 U.S. 106, 116-117 (1932); *Chrysler Corp.* v. *United States*, *supra*; *Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 297 (1880). See also *Walling* v. *Miller*, 138 F.2d 629 (8th Cir. 1943), *cert. denied*, 321 U.S. 784 (1944).[9] These principles have frequently been applied in employment discrimination cases. *E.g.*, *Moore* v. *City of San Jose*, 615 F.2d 1265, 1271-72 (9th Cir. 1980); *EEOC* v. *Safeway Stores, Inc.*, 611 F.2d 795, 799 (10th Cir. 1979), *cert. denied*, 446 U.S. 952 (1980); *Airline Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960, 963-64 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Carson* v. *American Brands, Inc.*, 654 F.2d 300 (4th Cir. 1981) (en banc), *adopting* 606 F.2d 420, 425, 431 (Winter, J.,

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[9] There are of course limitations on a federal court's inherent authority to modify a consent decree to effectuate its purpose. Essentially, these limitations are the same as those that exist on the court's authority to approve a consent decree; if the court could not have lawfully approved the consent decree had it contained the proposed modification, the court should not grant the modification. There are three such limitations. The court must have subject matter jurisdiction over the case. *Pacific R.R.* v. *Ketchum*, *supra*, 101 U.S. at 297. The parties cannot by consent deprive third parties of their substantive rights. *Society Hill Civic Ass'n* v. *Harris*, 632 F.2d 1045, 1059 (3d Cir. 1980). And there must be no applicable statutory restriction on the federal courts' inherent authority to approve or modify a consent decree. The district court's preliminary injunction exceeds none of these limitations. It had subject matter jurisdiction over the lawsuit. As discussed below, its order does not deprive third parties of any substantive rights. See p. 18. And the provisions of Title VII relied upon by petitioners do not restrict inherent judicial authority to approve or modify a consent decree. See pp. 19-20.

dissenting). Indeed, the principles apply with special force to Title VII cases, for in enacting that title "Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

Thus, the City should not be heard to say that respondents are not victims of discrimination. The original Stotts class action was brought on behalf of victims of the City's allegedly discriminatory hiring and promotional practices. J.A. 9-10. Had the case been tried, respondents might have established their entitlement to backpay, constructive seniority and promotion. But the case was settled and the City relinquished its right to litigate the issue of discrimination in exchange for avoiding the consequences of a judicial finding of discrimination and judicial identification of the victims of that discrimination. In short, petitioners' argument that the preliminary injunction exceeded the district court's remedial authority under Title VII rests on the notion that the factual disputes composed by the consent decree must now be resolved in their favor.[10]

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[10] Nothing in *System Federation No. 91* v. *Wright*, *supra*, relied upon by petitioners, conflicts with the principle that a federal court has inherent authority to modify a consent decree to fulfill its purpose. That case involved a union that, at a time when the Railway Labor Act prohibited union shop agreements, acceded to a consent decree that prohibited it from entering into union shop contracts. The Railway Labor Act was subsequently amended to permit union shop agreements and the union moved for prospective modification of the decree to permit it to negotiate for such an agreement. This Court held that the requested modification should be granted. The Court reasoned that the union's consent should be "read as directed toward events as they then were" and that continuation of the prohibition would be inequitable and inconsistent with the objectives of the amended Railway Labor Act. 364 U.S. at 647, 651-53. Nothing in the Court's opinion even faintly suggests that a consent decree may not be modified to effectuate its basic purpose unless the court could award such relief in a case litigated to judgment on the same incomplete factual record.

3. *Amicus curiae* AFL-CIO makes a slightly different argument. Brief for AFL-CIO as *Amicus Curiae* in Support of Petitioners at 2-3. The AFL-CIO assumes *arguendo* that a defendant may be able to consent to injunctive relief against it that could not have been forced upon the defendant in a judgment on the merits, and that such a decree may be modified to achieve its purpose. But AFL-CIO insists that a defendant's consent surely does not increase the court's authority to grant relief that inflicts injury on non-consenting parties. *Id.* at 3.

The AFL-CIO's interesting argument is beside the point because the district court's preliminary injunction did not inflict injury on third parties. That order simply required the City not to take action that would have vitiated the progress attained under the consent decree; it certainly did not require the City to lay off white firefighters.[11] Indeed, Judge McRae declined to express a view on whether the City would be violating the contractual rights of white firefighters if the City chose to go forward with the layoffs in the Fire Department. Pet. App. A76, A78. Under these circumstances, this Court's decision in *W.R. Grace & Co.* v. *Local Union 759*, 51 U.S.L.W. 4643 (U.S. May 31, 1983), provides the correct analysis of the situation. When an employer lays off white employees instead of black employees who are protected by a consent decree, the employer is shifting the burdens it has assumed to redress prior discrimination to its white employees. If such a reallocation abridges the rights of the white employees, they should look to the employer for relief.[12]

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[11] The City was free to forego any layoffs in the Fire Department and to reduce expenditures to the extent deemed necessary in other ways. For example, the City might have reduced the work week and salaries of all firefighters.

[12] Concurring Judge Martin made this point. 679 F.2d at 568-69; Pet. App. A47-50. The majority opinion of Judge Bailey Brown in *Brown* v. *Neeb*, 644 F.2d 551, 564-66 (6th Cir. 1981), a case quite similar to the instant one, also rests on this basis.

4. If Congress expresses an intention to restrict the federal court's inherent authority to modify a consent decree to effectuate its basic purpose, that intention must no doubt be respected. But there is not a hint of such an intention in the provisions of Title VII relied upon by petitioners.

Section 703(j) provides that nothing in Title VII shall be interpreted to "require" an employer to grant preferential treatment to any racial group "on account of" a racial imbalance in the employer's workforce. See *Steelworkers* v. *Weber*, 443 U.S. 193, 205-07 (1979); *Teamsters* v. *United States*, 431 U.S. 324, 374 n.61 (1977). This provision does not purport to limit a court's remedial authority to redress a violation of any substantive provision of Title VII. *Ass'n Against Discrimination in Employment, Inc.* v. *Bridgeport*, 647 F.2d 256, 280-81 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982). *A fortiori*, the section cannot be read as limiting a court's inherent authority to modify a consent decree composing a dispute arising under Title VII.

Section 703(h) provides that it is not a violation of Title VII for an employer to apply a bona fide seniority system. See *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 761 (1976). Like § 703(j), this provision does not limit remedial authority to redress violations of Title VII. As this Court has recognized, "[t]here is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice" is found. *Id.* at 761-62. *A fortiori*, the provision is not a limitation on a court's inherent authority to modify a consent decree.

Section 706(g) is the remedial provision of Title VII. It sets forth the judicial remedies available to a plaintiff who has established the defendant's liability under § 703. The first sentence of § 706(g) provides for judicial remedies "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the com-

plaint. * * *" 42 U.S.C. § 2000e-5(g). The last sentence of § 706(g)—the provision upon which petitioners rely—must be read in context as a limitation on the authority granted by the first sentence. It provides that "[n]o order of the court shall require" the hiring, reinstatement or promotion of an individual, or the payment to him of any back pay, "if such individual * * * was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin. * * *" This provision addresses the case where the plaintiff has established a violation of Title VII, but the employer can nevertheless defeat judicial relief for that individual by showing that the plaintiff would not have received the job, promotion or reinstatement even in the absence of discrimination—that is, that a lawful reason justified the adverse employment decision. *Day* v. *Mathews*, 530 F.2d 1083, 1085 & n.2 (D.C. Cir. 1976); *Patterson* v. *Greenwood School Dist. 50*, 696 F.2d 293, 295 (4th Cir. 1982); *King* v. *Laborers Int'l Union, Local No. 818*, 443 F.2d 273, 278-79 (6th Cir. 1971). See Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292 (1982). Thus, the last sentence of § 706(g) is expressly limited to cases where the court finds that the individual suffered the adverse employment decision for a reason other than discrimination. Such a finding, as well as the initial determination that the employer had violated Title VII, would be made only in a Title VII case litigated to judgment. The provision accordingly has no application to the court's authority to approve a consent decree settling a case, or to the court's authority to modify a consent decree to effectuate its purpose.

B. The District Court Did Not Abuse Its Discretion In Issuing the Preliminary Injunction

Having put aside petitioners' inapposite Title VII arguments, it remains to determine whether the district court's preliminary injunction was an appropriate exer-

cise of the district court's inherent authority to modify the consent decree.

1. The test for ruling on a plaintiff's request for modification of a consent decree is "whether the change serve[s] to effectuate * * * the basic purpose of the original consent decree." *Chrysler Corp.* v. *United States*, 316 U.S. 556, 562 (1942). If unanticipated circumstances threaten to prevent the decree from achieving its purpose, the decree should be modified to avoid that frustration of purpose. *Id.*; *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248-49 (1968); *Columbia Artists Management, Inc.* v. *United States*, 381 U.S. 348 (1965) (per curiam); *Liquid Carbonic Corp.* v. *United States*, 350 U.S. 869 (1955), *rev'g* 123 F. Supp. 653 (E.D.N.Y. 1954); *United States* v. *International Harvester Co.*, 274 U.S. 693, 702-04 (1927).[13]

Notwithstanding these authorities, petitioners argue that a consent decree can be judicially modified only upon a "clear showing of grievous wrong evoked by new and unforeseen conditions." Union Br. at 18 and City Br. at 18-19, both *quoting United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932). But as this Court made clear in *United Shoe Machinery Corp.*, *supra*, the "grievous wrong" language of *Swift* must be read in the context of *Swift*'s holding that a decree "may *not* be changed in the interest of the defendants if the purposes of the liti-

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[13] The lower courts apply the test for modification stated in the text. *E.g.*, *Ass'n Against Discrimination* v. *Bridgeport*, 710 F.2d 69, 74 (2d Cir. 1983); *Brown* v. *Neeb*, 644 F.2d 551, 565 (6th Cir. 1981); *Exxon Corp.* v. *Texas Motor Exchange*, 628 F.2d 500, 503 (5th Cir. 1980); *Evans* v. *Buchanan*, 512 F. Supp. 839, 849 (D.Del. 1981). The commentators also recognize it. *E.g.*, 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2961, p. 604 (1973) (*United Shoe* indicates that "modification is proper if the original purposes of the injunction are not being fulfilled in any material respect"); A. Larson, *Employment Discrimination* § 54.41, p. 11-84.32 (1983) ("If the consent decree is not achieving its purpose, as indicated by events subsequent to entry of the decree, the plaintiff may obtain a modification upon showing the failure of the agreed remedy").

gation as incorporated in the decree * * * have not been fully achieved." 391 U.S. at 248. The "grievous wrong" test is not applicable in the obverse situation, where the plaintiff seeks modification of a decree to effectuate its purpose. *Id.* at 249-52.[14]

2. This Court has recognized that "there must be wide discretion in the District Court" to assess whether changed circumstances justify modification of a consent decree. *System Federation No. 91* v. *Wright*, *supra*, 364 U.S. at 648. Such broad discretion is particularly appropriate where, as here, a district court does not render a permanent, facial modification to a decree but rather grants temporary injunctive relief to prevent frustration of a decree's purpose. See 679 F.2d at 678; Pet. App. A46-47 (Martin, J., concurring); *Brown* v. *Neeb*, *supra*, 644 F.2d at 565. See generally *Brown* v. *Chote*, 411 U.S. 452, 457 (1973); *Alabama* v. *United States*, 279 U.S. 229, 231 (1929).

The task before the district court was to determine whether the City's proposed layoffs would frustrate the purpose of the consent decree. Since a consent decree represents a compromise, its purposes are those "embodied in the instrument rather than the maximum aspirations—which are bound to be inconsistent anyway —of the interested parties." *White* v. *Roughton*, 689

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[14] Contrary to petitioners' contention, the district court's preliminary injunction is not inconsistent with the rule of *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959), and *Hughes* v. *United States*, 342 U.S. 353 (1952). Those cases hold that a court should not give a consent decree an *interpretation* that its language cannot sustain even if that interpretation would further the purposes of one of the parties to the decree. The Court in each of those cases reasoned that while "modification could be had after a proper hearing proving the need for such modification under applicable standards, it would not sanction such modification in the guise of construing a consent decree." *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.9 (1975). The district court's preliminary injunction was a modification of a consent decree, not an interpretation, and it was issued following an appropriate hearing.

F.2d 118, 119-20 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983). *Accord, United States* v. *Armour & Co.*, 402 U.S. 673, 681-82 (1971).

The decree at issue here provides that its purpose is "to insure that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied so that equal employment opportunity will be provided to all." Pet. App. A59-A60. In the same vein, the decree states that "[t]he purpose of this decree is to remedy the past hiring and promotion practices of the Memphis Fire Department. * * *" Pet. App. A64-65.

Toward these ends, the decree establishes as a long term goal the raising of "black representation [in] each job classification in the fire department to levels approximating the black proportion of the civilian labor force in Shelby County." Pet. App. A64. Moreover, "[t]o insure as quickly as practicable the attainment of [this] long range goal," the decree establishes interim race-conscious hiring and promotion ratios to be met on an annual basis. Pet. App. A64-65. The decree is silent on layoffs, as the parties did not anticipate this possibility. Pet. App. A73.

The stated purposes and remedial provisions of the decree fully support the district court's conclusion that the decree's purpose is "hiring and promotion" to overcome the present and continuing effects of racial discrimination in the Fire Department. Pet. App. A74. This purpose is to be achieved by adherence to concrete goals and ratios that assure prompt and ongoing correction of a condition—the extreme underrepresentation of blacks—caused by the Department's former policy of racial exclusivity. In sum, as the District Judge who entered the decree recognized, it reflects a firm commitment to continuous, incremental progress in eliminating the condition of gross discriminatory underrepresentation of blacks at all levels of the Fire Department.[15]

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[15] Though well-supported, this conclusion was necessarily preliminary since the preliminary injunction hearing was not consoli-

Judge McRae also reasonably concluded, on the basis of the limited record developed at the preliminary injunction hearing, that the City's proposed layoffs would vitiate that commitment. Pet. App. A74-75. He found that application of a seniority-based layoff policy in the Fire Department so soon after the City had made modest strides in promoting and hiring blacks within the Fire Department would frustrate the consent decree's purpose. Pet. App. A73-75. That determination, grounded on findings that are well supported and certainly not clearly erroneous, was well within Judge McRae's discretion. Moreover, as the Court of Appeals recognized, the preliminary injunction is also supported by the need to prevent irreparable harm to minority firefighters and by the public interest in preserving the progress made in redressing and eliminating discrimination within the Memphis Fire Department. 679 F.2d at 560; Pet. App. A31.

III. THE FEDERAL COURTS ARE AUTHORIZED TO GRANT RACE-CONSCIOUS AFFIRMATIVE RELIEF UNDER TITLE VII

We have shown that petitioners' contention that the preliminary injunction exceeds the limits of remedial authority under Title VII is inapposite because that order rests on the district court's inherent authority to modify a consent decree. We now show that petitioners are wrong in contending that the remedial provision of Title VII, § 706(g), does not authorize race-conscious relief.[16]

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dated with trial on the merits, as provided for in Fed.R.Civ.P. 65(a)(1). Petitioners could have chosen to challenge this conclusion before the district court and could have presented evidence to support a contrary view of the decree's purpose. See *United States* v. *ITT Continental Baking Co.*, *supra*, 420 U.S. at 238. They opted not to do so, and instead appealed the preliminary injunction.

[16] Petitioners also rely on § 703(h) and § 703(j), but neither of those provisions speaks to, much less limits, the judicial remedies available to correct violations of Title VII. See p. 19, *supra*.

The first sentence of § 706(g) confers broad authority on the federal courts to remedy unlawful employment practices:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay * * *, *or any other equitable relief as the court deems appropriate.*" 42 U.S.C. § 2000e-5(g) (emphases supplied).

Thus, § 706(g) authorizes such relief as deemed "appropriate." Of course, judicial remedial discretion must be exercised in conformity with the purposes of Title VII. *Teamsters* v. *United States*, 431 U.S. 324, 364 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-18 (1975). But where an employer has systematically discriminated against blacks in hiring and promotions, race-conscious relief well serves Title VII's primary purpose: "to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees." *Teamsters* v. *United States*, *supra*, 431 U.S. at 364. In such a case, race-conscious relief may be essential "to eliminate, so far as possible, the last vestiges" of the employer's discriminatory practices. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 417.

In the present case, the current effects of discrimination—the gross underrepresentation of blacks in the Fire Department—could not be cured by offering established victims of discrimination their "rightful place" in the Department. Even if such victims could be identified, many will have gone on to other employment and be uninterested in joining the Fire Department. Moreover, when a governmental agency systematically excludes a racial minority from employment in all or some of its

public jobs, the victims of that discrimination are not limited to identifiable members of the minority group who actually applied for or were demonstrably deterred from applying for the off-limits jobs. Here, the City of Memphis had maintained a uniracial firefighting force. For this reason, most black Memphians would not even have considered firefighting as a possible occupation for them. Thus, petitioners' proposed dichotomy between victims and non-victims is illusory where the employer's pervasive racial discrimination is manifest. That dichotomy, if adopted, would prevent effective redress of manifest discrimination and would lock in the effects of such discrimination. For these reasons, the courts of appeals are unanimous in recognizing that affirmative race-conscious relief such as hiring and promotion goals is "appropriate" within the meaning of § 706(g).[17] The dis-

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[17] *E.g.*, *Thompson* v. *Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *EEOC* v. *A.T.&T. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm* v. *United States Postal Service*, 635 F.2d 482, 499 (4th Cir. 1981); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Wks.* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969); *United States* v. *I.B.E.W., Local No. 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *Firefighters Inst.* v. *City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.) *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979).

Contrary to the view of the *amicus* United States, this Court's decisions in *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976), and *Teamsters* v. *United States*, 431 U.S. 324 (1977), are fully consistent with the unanimous view of the circuits that race-conscious relief is authorized by Title VII. *Franks* and *Teamsters* involved the showing that a member of the plaintiff class must make to obtain individual "rightful place" relief such as retroactive seniority. They intimate no view on race-conscious relief.

trict court's preliminary injunction—which simply prohibited the City from conducting layoffs that would vitiate the City's hiring and promotional commitments and did not require the layoff of white firefighters—is likewise appropriate.

Contrary to petitioners' contention, the last sentence of § 706(g) does not withdraw the broad authority to grant race-conscious relief conferred by the first sentence. Unlike the first sentence's broad authorization of "any" appropriate relief against a respondent found to have violated Title VII, the last sentence's limitation on judicial orders applies only to individual relief: "No order of the court shall require the * * * hiring, reinstatement, or promotion of an *individual* as an employee, if such individual was * * * refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. By its terms, this provision merely precludes a court from ordering that a specific individual be hired, promoted or reinstated if the employer has refused to hire or promote that individual, or has discharged him, for nondiscriminatory reasons. See cases cited p. 20, *supra*. Race-conscious remedies such as those embodied in the original consent decree and the preliminary injunction effectuating that decree, do not award individual relief. They establish ratios and targets for overcoming discrimination. Nothing in the preliminary injunction or the consent decree precludes the Fire Department from laying off, or declining to promote, any specific black firefighter. Thus, those orders are fully consistent with § 706(g). See *EEOC* v. *A.T.&T. Co.*, 556 F.2d 67, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).[18]

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[18] The last sentence of § 706(g), with its exclusive focus on individual relief, may be usefully contrasted with § 703(j), which provides that Title VII does not "require" an employer "to grant preferential treatment to any individual or to any *group*" solely because the employer's workforce is not racially balanced. This

The legislative history of Title VII of the Civil Rights Act of 1964 confirms that the last sentence of § 706(g) was intended merely to make clear that an individual who was denied employment opportunities for reasons other than discrimination does not have a remedy under Title VII. 110 Cong. Rec. 2567 (Feb. 8, 1964) (remarks of Rep. Celler, draftsmen of the last sentence of § 706 (g)); 110 Cong. Rec. 2568, 2570 (Feb. 8, 1964) (remarks of Rep. Gill). Developments subsequent to 1964 only strengthen that interpretation of § 706(g).

In the Equal Employment Opportunity Act of 1972, Congress extended Title VII to government employees and reenacted § 706(g) with amendments.[19] 86 Stat. 103, 107 (Mar. 24, 1972). Prior to passage of the 1972 legislation Title VII had been consistently construed as authorizing race-conscious ratios. *E.g.*, *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (requiring admission of specific percentages of minorities to apprenticeship programs); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1055 (5th Cir. 1969) (requiring union referral of one black worker for each white worker). In re-enacting

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shows that if Congress had intended to proscribe race-conscious remedies that benefit a group, it would have expressly said so. Moreover, § 703(j), in providing that Title VII does not require group preferences solely to redress racial imbalance, strongly suggests that race-conscious relief is available to remedy independent violations of Title VII. See *Steelworkers* v. *Weber*, 443 U.S. 193, 205-06 (1979).

[19] Specifically, § 706(g) was amended to clarify that "affirmative" relief is "not limited to" orders granting backpay and reinstatement, to make clear that a court may award "other equitable relief" that it deems appropriate, and to specify an accrual date for backpay. 86 Stat. 103, 107. This expansion of the remedial language in § 706(g) is additional proof that Congress did not intend to limit affirmative relief to individual "rightful place" relief.

§ 706(g), Congress ratified the prevailing judicial interpretation of that provision. *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Indeed, a section-by-section analysis accompanying the final version of the bill stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972* ("1972 Leg. Hist."), p. 1844. Moreover, Congress rejected an amendment designed to overturn the prevailing judicial interpretation that Title VII authorized quota relief.[20]

Thus, Congress, in re-enacting and amending Title VII in 1972, expressly endorsed the prevailing judicial view that the remedial authority conferred by § 706(g) encompasses race-conscious affirmative action that may benefit persons who are not proven victims of discrimination. *United States* v. *Int'l Union of Elevator Constructors Local Union No. 5*, 538 F.2d 1012, 1019-20 (3d Cir. 1976); *United States* v. *IBEW, Local No. 212*, 472 F.2d 634, 636 (6th Cir. 1973); see *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 353 n.28 (1978) (opinion of Brennan, White, Marshall & Blackmun, JJ.)

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[20] Senator Ervin proposed an amendment providing that no agency or officer of the federal government shall require an employer to hire persons of a particular race "in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 Cong. Rec. 1662 (Jan. 27, 1972), *reprinted in* 1972 Leg. Hist. at 1039. Senators Javits and Williams spoke against the Ervin amendment, arguing that the amendment would even deprive the courts of power to remedy cases of proven discrimination under Title VII. *Id.* at 1071 (remarks of Sen. Javits); *id.* at 1072 (remarks of Sen. Williams). The amendment was defeated by a vote of 44 to 22. *Id.* at 1074.

("[e]xecutive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race").[21]

CONCLUSION

For the reasons stated in Part I, the judgment of the court of appeals should be vacated and the case remanded with directions to dismiss as moot. Should this Court reach the merits, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[21] *Steelworkers* v. *Weber*, 443 U.S. 193 (1979), holds that an employer may voluntarily implement remedial racial ratios without violating Title VII's prohibition against racial discrimination. In light of that holding, it would indeed be anomalous to hold that Title VII prohibits federal courts from granting race-conscious relief for proven violations of the title. The district court in *Weber* had disallowed the voluntary quota system because "the courts alone are in a position to afford due process to all concerned in determining the necessity for and in fashioning such relief." 415 F. Supp. 761, 767-68, *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).